No. 19-292

In the Supreme Court of the United States

ROXANNE TORRES, PETITIONER

v.

JANICE MADRID, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF VACATUR
AND REMAND

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
ERIC S. DREIBAND
Assistant Attorneys General
ERIC J. FEIGIN
Deputy Solicitor General
ALEXANDER V. MAUGERI
Deputy Assistant Attorney General
REBECCA TAIBLESON
Assistant to the Solicitor General
TOVAH R. CALDERON
JENNY C. ELLICKSON
BRANT S. LEVINE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a law-enforcement officer's shooting of a subject who continues to flee should be analyzed as a Fourth Amendment seizure for purposes of determining its constitutionality.

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INTEREST OF THE UNITED STATES

This case presents the question whether a law-enforcement officer's shooting of a subject who continues to flee should be analyzed as a Fourth Amendment seizure for purposes of determining its constitutionality. The Fourth Amendment standard applies to both federal and state law-enforcement officers. The United States often defends federal law-enforcement officers who face personal liability for alleged Fourth Amendment violations. The United States also prosecutes law-enforcement officers who willfully violate the Fourth Amendment, see 18 U.S.C. 242, and brings civil actions to address systemic Fourth Amendment violations by law enforcement, see 34 U.S.C. 12601 (Supp. V 2017). Issues relating to the question presented could also arise in the context of a suppression motion in a federal

criminal case. The United States therefore has a substantial interest in the Court's decision on the question.

STATEMENT

1. In the early morning hours of July 15, 2014, New Mexico State Police officers—including respondents Janice Madrid and Richard Williamson—went to an apartment complex in Albuquerque to serve an arrest warrant on a female suspect. Pet. App. 2a, 10a-11a. Respondents were wearing "tactical vests and dark clothing" that "clearly identified them as police officers." *Id.* at 11a. The officers approached petitioner as she sat in the driver's seat of a Toyota FJ Cruiser in the complex's parking lot. *Id.* at 2a, 11a. Petitioner had backed the Cruiser, which is a sport-utility vehicle (SUV), into a parking spot between two other vehicles, and the motor was running when the officers approached. See J.A. 24; Pet. App. 2a, 11a.[*]

Petitioner was in a "[b]ad" state of mind that morning because she had been awake "for days" and was "crashing" from methamphetamine withdrawal. C.A.

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[*] This brief describes the facts in a manner consistent with the lower court opinions. Some factual disputes exist. For example, the circumstances that precipitated respondents' approach to petitioner's SUV are unclear. At her deposition, petitioner initially suggested that she never got out of the SUV, remaining inside for five to ten minutes before the officers approached. See C.A. App. 102. Later in the deposition, however, petitioner stated that she was outside the SUV for five to ten minutes and had reentered the SUV when it had begun to rain. See *id.* at 204. Officers on the scene similarly testified that they observed petitioner outside the SUV. See *id.* at 113, 120. Two of the officers testified that they began to approach petitioner while she was standing outside the SUV talking to a man and that, on seeing the officers, the man fled and petitioner immediately got in the SUV and started the engine. See *id.* at 120-121, 124, 259.

App. 108; see also Pet. App. 2a-3a. Both officers testified that they saw petitioner making "furtive" or "aggressive" movements inside the SUV as they approached. Pet. App. 3a (citations omitted); J.A. 55, 94. The officers attempted to address petitioner through the driver's side window, but petitioner testified that she did not notice them until she heard a "flicker" on the handle of her locked car door. J.A. 22-23; see Pet. App. 3a, 11a.

According to petitioner, when she heard that "flicker," she looked up, saw the officers outside the vehicle, and "freak[ed] out," believing that she was being carjacked. J.A. 23; see Pet. App. 3a, 11a. Petitioner "put the car into drive" and prepared to "step on the gas." J.A. 23. At the time, Officer Williamson was standing near the driver's door, between the Cruiser and an adjacent vehicle, and Officer Madrid was standing closer to the front of the SUV, "at the front tire." Pet. App. 11a. When petitioner shifted the SUV into drive, Officer Williamson drew his firearm. *Id.* at 3a; see J.A. 23. At some point, Officer Madrid drew her firearm as well. Pet. App. 3a; see J.A. 23.

As the SUV began to move forward, both officers began to discharge their weapons. Pet. App. 3a-4a, 11a; see C.A. App. 206. Officer Madrid testified that the Cruiser "drove at her" and that she shot "at the driver through the windshield" in an attempt "to stop the driver from running her over." Pet. App. 3a (quoting C.A. App. 114) (brackets omitted). Officer Williamson testified that he fired at petitioner because he feared being "crushed" between the Cruiser and the neighboring car and because he sought "to stop the action of the Cruiser going towards Officer Madrid." *Id.* at 3a-4a (quoting C.A. App. 125) (brackets omitted). Petitioner

was hit twice, *id.* at 4a; she alleges that both bullets "entered her back," Pet. Br. 5.

Petitioner continued to drive ahead, traveling over a curb, through some landscaping, and down a street. Pet. App. 4a, 11a. Petitioner ultimately stopped in a parking lot, where she laid down on the ground and attempted to "surrender" to the "carjackers," on the belief that they might be following her. *Id.* at 4a (quoting C.A. App. 208). Petitioner asked a bystander to call the police, but she did not want to remain at the scene because she had an outstanding arrest warrant. *Ibid.* Instead, petitioner stole a different car and drove approximately 75 miles to a hospital in Grants, New Mexico. *Ibid.*; see *id.* at 12a.

Petitioner was later airlifted to a hospital in Albuquerque, where she was arrested the following day. Pet. App. 4a, 12a. She ultimately pleaded no contest to three New Mexico offenses: aggravated fleeing from a law-enforcement officer (Officer Williamson), assault on a police officer (Officer Madrid), and unlawfully taking a motor vehicle. *Ibid.*; see C.A. App. 142-147.

2. In October 2016, petitioner filed a civil-rights action under 42 U.S.C. 1983 against respondents, alleging that they violated her Fourth Amendment rights by using excessive force against her. Pet. App. 4a-5a; J.A. 4-10. With the parties' consent, a magistrate judge conducted dispositive proceedings in the case. 16-cv-1163 Docket entry No. (Docket entry No.) 2 (Oct. 21, 2016); Docket entry No. 3 (Oct. 24, 2016); Docket entry No. 11 (Nov. 14, 2016).

After the magistrate judge denied the officers' motion to dismiss petitioner's complaint, see Pet. App. 21a-31a, respondents moved for summary judgment, *id.* at 10a. In support of the motion, respondents maintained

that they were entitled to qualified immunity because their use of force was reasonable and did not violate clearly established law, and that petitioner's convictions for fleeing from Officer Williamson and assaulting Officer Madrid precluded her civil claims. *Id.* at 13a. Respondents also argued that because petitioner continued to flee after being shot, she was never "seized," and that she therefore could not pursue an excessive-force claim under the Fourth Amendment. *Ibid.*

Addressing only that last argument, the magistrate judge granted the summary-judgment motion and dismissed the case with prejudice. Pet. App. 10a-20a. The magistrate judge explained that, in order to prove an excessive-force claim under the Fourth Amendment, petitioner must first show that a "seizure" occurred. *Id.* at 17a. The magistrate judge observed that under circuit precedent, a "seizure requires the 'intentional acquisition of physical control' of the person being seized." *Ibid.* (quoting *Childress* v. *City of Arapaho*, 210 F.3d 1154, 1156 (10th Cir. 2000)). And the magistrate judge concluded that "the undisputed material facts"—in particular, that petitioner "never stopped in response to police action"—"show that [she] was never seized." *Id.* at 13a, 20a.

3. The court of appeals affirmed on that same ground. Pet. App. 1a-9a. The court explained that "'without a seizure, there can be no claim for excessive use of force' under the Fourth Amendment." *Id.* at 7a (brackets and citation omitted). And the court concluded that petitioner had "failed to show she was seized by the officers' use of force." *Ibid.*; see *id.* at 9a.

The court of appeals deemed this case to be "governed by" *Brooks* v. *Gaenzle*, 614 F.3d 1213 (10th Cir. 2010), cert. denied, 562 U.S. 1200 (2011), which had

"held that a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." Pet. App. 7a (citing *Brooks*, 614 F.3d at 1223-1224). In particular, the court understood *Brooks* to set forth a legal rule that "an officer's intentional shooting of a suspect does not effect a seizure unless the 'gunshot terminates the suspect's movement or otherwise causes the government to have physical control over him.'" *Id.* at 7a-8a (quoting *Brooks*, 614 F.3d at 1224) (brackets and ellipsis omitted). And because petitioner "managed to elude police for at least a full day after being shot," the court concluded that petitioner was not seized when the officers shot her and that petitioner's civil claims accordingly failed as a matter of law. *Id.* at 8a.

As they had in the district court, respondents had raised on appeal several alternative arguments that would independently support a grant of summary judgment. Resp. C.A. Br. 19-25. They maintained that (1) their use of deadly force was constitutionally reasonable, see *id.* at 19-21; (2) petitioner's convictions for assault and aggravated fleeing barred her civil claims, see *id.* at 21-23; and (3) they were entitled to qualified immunity because petitioner had failed to demonstrate that their actions were contrary to clearly established law, see *id.* at 24-25. The court of appeals did not reach any of those arguments.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the Fourth Amendment has no application to this case because petitioner managed to flee after being shot by police. This Court's precedents establish that the police may effect a Fourth Amendment seizure by intentionally applying restraining physical force to a subject. A subject's escape will render the seizure fleeting, but will

not negate the seizure entirely. It is therefore clear that respondents momentarily seized petitioner when they shot her. It is not at all clear, however, that the shooting actually violated the Fourth Amendment, or that respondents should face liability, and this Court should remand so that the lower courts may apply the correct legal framework to analyze petitioner's claims.

I. Law-enforcement officers can seize a person within the meaning of the Fourth Amendment in two ways: by a "show of authority," such as a command to halt, or "by means of physical force." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). This Court's precedents have differentiated between the two types of seizures. The threshold defining feature of a physical-force seizure is actual physical impact on a subject's person; in the absence of such impact, the police may have attempted a seizure (or made a show of authority), but they have not effected a seizure by physical force. That physical impact must be intentional, not accidental. And the officer's use of force against the subject must be designed to restrain his movement. Like nearly all Fourth Amendment analyses, the inquiry requires an objective assessment of the officer's conduct, rather than focusing on the subjective motivations of the officer or any beliefs that would not be attributable to a reasonable innocent person.

A physical-force seizure does not, however, necessarily require that the subject submit to law enforcement. Instead, under *California* v. *Hodari D.*, 499 U.S. 621 (1991), the "application of physical force to restrain movement" is a "seizure" under the Fourth Amendment, "even when it is ultimately unsuccessful." *Id.* at 626. While the facts of *Hodari D.* involved a show-of-authority seizure, the Court's determination that a

show-of-authority seizure is not complete unless the subject submits to an officer's authority was grounded in an explicit contrast with a physical-force seizure, which does *not* require submission. The court of appeals erred in disregarding *Hodari D.*'s extensive discussion of that point, which has not been abrogated by any other decision of this Court.

Although submission is not a prerequisite for a physical-force seizure, its absence does affect the seizure's length. When the police intentionally apply restraining force to a subject but the subject continues to flee, the seizure lasts only as long as the application of force. That rule is required by the plain text of the Fourth Amendment, follows from this Court's precedents defining a "seizure," and is consistent with the common law.

II. A straightforward application of this Court's precedents to the undisputed facts of this case establishes that petitioner was momentarily seized when respondents shot her, notwithstanding her continued flight. Respondents seized petitioner by intentionally shooting her twice, objectively manifesting an intent to restrain her by stopping her from driving forward. The seizure, however, lasted only for the brief period of the bullets' impact.

The court of appeals' threshold error means only that it should have analyzed petitioner's claim under the Fourth Amendment—not that petitioner should necessarily prevail. The Fourth Amendment prohibits only "*unreasonable* * * * seizures." U.S. Const. Amend. IV (emphasis added). Respondents have maintained that their use of force here was a reasonable response to the threat of injury that petitioner posed in driving the SUV. They have also maintained that, at the very least,

no clearly established law held otherwise, thereby entitling them to qualified immunity. Those issues should be analyzed in light of Fourth Amendment doctrine on remand.

ARGUMENT

Although respondents' actions in this case did not necessarily violate the Fourth Amendment's prohibition "against unreasonable * * * seizures," U.S. Const. Amend. IV, the uncontested facts establish that respondents' actions did constitute a "seizure" whose constitutionality would turn on its reasonableness. This Court has emphasized "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of * * * [a] 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard," not under a "more generalized notion of 'substantive due process.'" *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). And it made clear in *California* v. *Hodari D.*, 499 U.S. 621 (1991), that the "application of physical force to restrain movement" is a "seizure" under the Fourth Amendment, "even when it is ultimately unsuccessful." *Id.* at 626. The lower courts accordingly erred in granting summary judgment to respondents on the ground that they did not actually prevent petitioner from escaping. The undisputed facts instead demonstrate that petitioner was seized, albeit only momentarily, when respondents' bullets hit her. The case should therefore be remanded for further proceedings to determine whether respondents in fact committed a constitutional violation for which they could be liable for damages.

I. THE APPLICATION OF RESTRAINING PHYSICAL FORCE CAN EFFECT A TEMPORARY SEIZURE EVEN IF THE SUBJECT DOES NOT YIELD

While "encounters between citizens and police officers are incredibly rich in diversity," a Fourth Amendment seizure can occur in only one of two ways: by a "show of authority," such as a command to halt, or "by means of physical force." *Terry* v. *Ohio*, 392 U.S. 1, 13, 19 n.16 (1968). To effect a seizure by physical force, a law-enforcement officer must intentionally apply physical force to a subject in a manner objectively designed to restrain him. Unlike a show-of-authority seizure, however, a physical-force seizure does not necessarily require that the officer succeed in stopping the subject; a subject's failure to yield shortens the seizure, but does not negate it.

A. A Physical-Force Seizure Under The Fourth Amendment Requires Intentional Application Of Restraining Physical Force By Law Enforcement

As the Court has recognized, a law-enforcement officer's application of physical force to a subject can in itself constitute a Fourth Amendment seizure. See, *e.g.*, *Hodari D.*, 499 U.S. at 626; *Terry*, 392 U.S. at 19 n.16. In particular, a subject may be seized when he is physically impacted by the intentional use of restraining force.

The threshold defining feature of a physical-force seizure is an actual physical impact. An encounter that "does not involve the *application* of any physical force"—*e.g.*, where an officer reaches for the subject but whiffs—cannot constitute a seizure by physical force. *Hodari D.*, 499 U.S. at 625 (emphasis added). As the Court has emphasized, "neither usage nor common-law tradition makes an *attempted* seizure a seizure," *id.* at 626 n.2.

For example, although at common law even "the slightest application of physical force" could in some circumstances amount to an "'arrest,'" at least some impact was required. *Id.* at 625 (quoting Asher L. Cornelius, *The Law of Search and Seizure* 163-164 (2d ed. 1930)); see *ibid.* (quoting Cornelius's description of common-law decision in which the distinction between an attempted and an actual arrest turned on whether "the bailiff had touched" the suspect) (citation omitted); *id.* at 624-625 (citing *Whithead* v. *Keyes,* 85 Mass. (3 Allen) 495, 501 (1862) (defining an arrest by reference to "laying [officer's] hand on" subject)); Restatement of Torts § 41, cmt. h (1934) (explaining that "mere touching" could constitute an arrest only when the officer has lawful arrest authority) (cited at *Hodari D.*, 499 U.S. at 624-625).

The impact of the physical force must be "intentional" rather than "accidental." *Brower* v. *County of Inyo,* 489 U.S. 593, 596 (1989). As the Court has observed, "the word 'seizure' * * * can hardly be applied to an unknowing act." *Ibid.* Thus, "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, * * * but only when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* at 596-597. A "parked and unoccupied police car slip[ping] its brake and pin[ning] a passerby against a wall" is not a seizure—even "if the passerby happened * * * to be a serial murderer for whom there was an outstanding arrest warrant" who "was in the process of running away from two pursuing constables." *Id.* at 596. But a police car "pull[ing] alongside [a suspect's] fleeing car and sideswip[ing] it, pro-

ducing [a] crash," would be a seizure, unless the sideswipe was "unintended." *Id.* at 596-597; see *County of Sacramento* v. *Lewis*, 523 U.S. 833, 844 (1998) (finding no seizure where police officer accidentally struck suspect thrown from motorcycle during high-speed pursuit).

In addition to impacting the subject and being intentional, the physical force must be designed "to restrain movement." *Hodari D.*, 499 U.S. at 626. It would be anomalous, to say the least, for a calming hand on the shoulder of a crime victim, or a firm handshake at the beginning of a consensual interview, to constitute a Fourth Amendment "seizure," and this Court's definition of the term has not encompassed such actions. In defining a "seizure," the Court has, for example, looked to the common-law definition of "arrest," under which force would constitute an arrest only when applied "for th[e] purpose" of "making the arrest." *Id.* at 624-625 (quoting Cornelius 163). See *Whithead*, 85 Mass. (3 Allen) at 501("[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him *for the purpose of arresting him*.") (emphasis added; cited at *Hodari D.*, 499 U.S. at 624); see, *e.g.*, Restatement § 112, cmt. a (explaining that physical contact when "acting in the exercise of a privilege to arrest * * * constitutes an arrest, if it is imposed for the purpose of making an arrest").

As in similar law-enforcement contexts, the proper characterization of an officer's force does not require an inquiry into either the officer's or the subject's subjective beliefs. See, *e.g.*, *Brendlin* v. *California*, 551 U.S. 249, 260 (2007) (objective approach to determining "the intent of the police" in a show-of-authority traffic stop); see also, *e.g.*, *Michigan* v. *Bryant*, 562 U.S. 344, 361 (2011) (objective approach to determining "'primary purpose'

of an interrogation" under the Confrontation Clause); *United States* v. *Leon*, 468 U.S. 897, 922 & n.23 (1984) (objective approach to determining officer's "good faith" reliance on a warrant) (citation omitted). The critical issue is "the intent of the police as objectively manifested," rather than either "the motive of the police for taking the intentional action," *Brendlin*, 551 U.S. at 260, or any perceptions of police conduct that might differ from a reasonable innocent person's, see, *e.g.*, *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991). The Court has explained, for example, that because a roadblock "is designed to produce a stop by physical impact if voluntary compliance does not occur," it is irrelevant whether officers had the "subjective intent" that such physical impact in fact occur. *Brower*, 489 U.S. at 598. Conversely, the Court has not treated the mere happenstance of some intentional physical contact by law enforcement as an invitation to delve into an officer's subjective motivations or a subject's individual beliefs. See *INS* v. *Delgado*, 466 U.S. 210, 220-221 (1984) (applying objective standard to find no show-of-authority seizure where person was "tapped on the shoulder" and asked for immigration paperwork).

B. A Subject's Failure To Yield Affects The Duration, But Not The Existence, Of A Physical-Force Seizure

An officer's intentional application of restraining physical force need not actually succeed in restraining the subject in order to constitute a seizure. As this Court explained in *Hodari D.*, submission to an officer's actions is an element only of show-of-authority seizures, not physical-force seizures. In the context of a physical-force seizure, a subject's non-submission is relevant to the seizure's duration—which lasts only as long as the force is being applied—not to its existence.

1. In *Hodari D.*, the Court rejected a criminal defendant's argument that he was seized within the meaning of the Fourth Amendment while running from a pursuing police officer. See 499 U.S. at 623, 629. The Court reasoned that even "assuming that [the officer's] pursuit * * * constituted a 'show of authority' enjoining [the defendant] to halt," the defendant was not seized during the chase "since [he] did not comply with that injunction." *Id.* at 629. As a result, the cocaine that the defendant tossed away before he was "tackled" at the end of the chase was "not the fruit of a seizure," and not subject to suppression. *Ibid.*

The Court framed the question presented in the case as "whether, with respect to a show of authority *as with respect to application of physical force*, a seizure occurs even though the subject does not yield." *Hodari D.*, 499 U.S. at 626 (emphasis added). In "hold[ing] that it does not," the Court explained that the Fourth Amendment's reference to "seizures" draws meaning from the common-law definition of an arrest, which "requires *either* physical force * * * *or*, where that is absent, *submission* to the assertion of authority." *Ibid.* The Court accordingly held that a "show of authority" seizure has two elements: the "officer's words and actions" must objectively "convey[] * * * to a reasonable person" that "he [is] being ordered to restrict his movement," *id.* at 628, and the subject must submit to the officer's authority, *id.* at 626. The Court emphasized, however, that a physical-force seizure does not require that second element, and can instead occur based on the "application of physical force to restrain movement, even when it is ultimately unsuccessful." *Ibid.*

The Court recognized that "[f]rom the time of the founding to the present, the word 'seizure' has meant a

'taking possession'" and "[f]or most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control." *Hodari D.*, 499 U.S. at 624 (citation omitted). It also acknowledged that "one would not normally think that the mere touching of a person would suffice" to constitute a "seizure." *Id.* at 626 n.2. The Court observed that in the context of "an arrest, however—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." *Id.* at 624. And it reasoned that "[t]he word 'seizure'" in the Fourth Amendment "readily bears" a meaning that would encompass, for example, the grasping of a suspect who is able to break free. *Id.* at 626.

2. Although the facts of *Hodari D.* itself involved a show-of-authority seizure, no sound basis exists for disregarding its explication of the requirements for a physical-force seizure. The court of appeals deemed that aspect of the Court's decision to be "common law dicta" and read other decisions of this Court to require that "physical touch (or force) must terminate the suspect's movement" (or "otherwise cause the government to have physical control over him") in order to constitute a seizure. *Brooks* v. *Gaenzle*, 614 F.3d 1213, 1221, 1223, 1224 (10th Cir. 2010), cert. denied, 562 U.S. 1200 (2011); see Pet. App. 7a (relying on *Brooks*). None of this Court's decisions, however, impose such a requirement, or otherwise suggest that *Hodari D.*'s extensive analysis of physical-force seizures is incorrect.

The court of appeals erred in viewing *Hodari D.*'s discussion of physical-force seizures to conflict with

other decisions of this Court. As the court of appeals has noted, see *Brooks*, 614 F.3d at 1219-1221, this Court has "oft-repeated" that "the 'seizure' of a person within the meaning of the Fourth Amendment" is the "meaningful interference, however brief, with an individual's freedom of movement." *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (collecting cases). That definition, however, is consistent with *Hodari D.*'s recognition that "with respect to application of physical force, a seizure occurs even though the subject does not yield," 499 U.S. at 626. Whether or not a subject yields, the actual "application of physical force to restrain movement," *ibid.*, can "interfer[e], however brief[ly], with * * * freedom of movement," *Jacobsen*, 466 U.S. at 113 n.5. Where, for example, someone has "broke[n] out of [an officer's] grasp," *Hodari D.*, 499 U.S. at 626, his freedom of movement has been briefly impeded, even though the officer has not "succeeded in subduing" him, *id.* at 624.

The court of appeals' submission requirement for a physical-force seizure also finds no support in the specific holdings of the decisions of this Court on which the court of appeals relied. See *Brooks*, 614 F.3d at 1219-1221. Two of the decisions concerned asserted seizures that did not involve physical force at all. See *Brendlin*, 551 U.S. at 252 (traffic stop); *United States* v. *Mendenhall*, 446 U.S. 544, 547-549 (1980) (opinion of Stewart, J.) (interview at an airport). One involved accidental, rather than intentional, application of physical force, and found that no seizure had occurred on that ground alone. *Lewis*, 523 U.S. at 844. And the remainder involved physical force, intentionally applied by police officers, that indisputably terminated the subject's movement. See *Brower*, 489 U.S. at 594 (fatal collision with

a roadblock); *Tennessee* v. *Garner*, 471 U.S. 1, 4 (1985) (fatal shot to the head); *Terry*, 392 U.S. at 7 (grabbing suspect, spinning him around, and keeping him in place for purposes of frisking him).

3. Although submission is not a prerequisite for a physical-force seizure, its absence remains relevant to the Fourth Amendment analysis, because it affects the seizure's length. "To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity." *Hodari D.*, 499 U.S. at 625. When the application of restraining force does not actually succeed in bringing the subject within the officer's physical control, a seizure will be transitory—perhaps instantaneous—in duration.

At common law, a "seizure [was] a single act, and not a continuous fact." *Hodari D.*, 499 U.S. at 625 (quoting *Thompson* v. *Whitman*, 85 U.S. (18 Wall.) 457, 471 (1874)). Dictionary definitions from near the time of the Fourth Amendment's adoption are likewise consistent with the understanding of a "seizure" as a single event. See, *e.g.*, 2 Noah Webster, *An American Dictionary of the English Language* 67 (1828) (defining "seizure" as "the act of laying hold on suddenly") (capitalization omitted); 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "seizure" as "the act of taking forcible possession") (capitalization omitted); Thomas Dyche & William Pardon, *A New General English Dictionary* (14th ed. 1771) (defining "seize" as "to lay or take hold of violently or at unawares, wrongfully, or by force") (capitalization omitted); see also *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 927 (2017) (Alito, J., dissenting).

The Fourth Amendment incorporates that limitation. As the Court has explained, if an officer "ha[s] laid his hands upon [a subject] to arrest him," but the subject "ha[s] broken away," "it would hardly be realistic to say that" a subsequent event occurred "during the course of an arrest." *Hodari D.*, 499 U.S. at 625. As discussed above, see p. 16, *supra*, this Court has frequently described a "seizure" as the "meaningful interference, however brief, with an individual's freedom of movement." *Jacobsen*, 466 U.S. at 113 n.5; see also *Terry*, 392 U.S. at 19 n.16 (a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen"). When a law-enforcement officer makes physical contact with a subject with force designed to restrain the subject, the officer has "interfer[ed] * * * with an individual's freedom of movement." *Jacobsen*, 466 U.S. at 113 n.5. When the subject flees and the application of force ceases, however, the "brief" restraint on liberty is over, and the seizure has ended.

Accordingly, even if the subject was unreasonably seized, any legal claim premised on that illegal seizure would need to account for the seizure's ephemeral character. If, for example, the subject discarded evidence after his escape, the Fourth Amendment's exclusionary rule could preclude admission of that evidence in a criminal prosecution only if the discovery of the evidence was, *inter alia*, "derivative of" the illegal seizure and insufficiently "attenuated" from the illegality. *Utah* v. *Strieff*, 136 S. Ct. 2056, 2059, 2061 (2016). And any damages claimed in a civil suit would be limited to harms traceable to the brief moment of the seizure.

II. THIS COURT SHOULD VACATE THE DECISION BELOW AND REMAND FOR FURTHER PROCEEDINGS

The lower courts erred in granting summary judgment to respondents on the theory that petitioner was not seized. A straightforward application of the test for a physical-force seizure to the undisputed facts of this case establishes that petitioner was momentarily seized when respondents shot her, even though the shots did not stop her from continuing to escape. This Court should accordingly vacate the decision below and remand so that the lower courts can address in the first instance whether other grounds support the grant of summary judgment.

A. When Petitioner Was Shot, She Was Momentarily Seized By The Application Of Physical Force

Although many of the facts of this case are disputed, the parties appear to agree on the ones that are critical to the determination of whether petitioner was seized. In particular, the parties appear to agree that respondents approached and attempted to engage with petitioner when she was in an SUV, Pet. App. 2a-3a, 11a; see Pet. 5-6; Br. in Opp. 1-2; that petitioner saw respondents outside the SUV and declined to open the door or window to speak to them, see Pet. App. 3a, 11a; Pet. 5-6; Br. in Opp. 1-2; that petitioner instead began to drive forward, Pet. App. 3a, 11a; Pet. 6; Br. in Opp. 2; and that respondents reacted by firing their weapons at petitioner, who was struck by two of their bullets, Pet. App. 3a-4a, 11a; Pet. 6; Br. in Opp. 2. Under those circumstances, each bullet that struck petitioner constituted an intentional application of physical force that objectively manifested an intent to restrain her freedom of movement—namely, her continued ability to operate

the SUV and to move forward. Petitioner was therefore "seized" at the moment each bullet hit her.

The seizures, however, ended immediately after they started. Neither shot stopped petitioner from fleeing. Pet. App. 4a; Pet. 6; Br. in Opp. 3. And although petitioner may have suffered injuries with continued physical effects, see, *e.g.*, Pet. Br. 5 (alleging temporary loss of left-arm mobility), those effects do not in themselves constitute a continuing application of physical force by respondents that might qualify as a "seizure." If the bare fact of a subject's physical injury were enough to constitute a "seizure," then a subject with a lingering injury would implausibly be "seized" for the rest of her life—even if she permanently eluded capture. Nothing would support such an expansive interpretation of the term.

B. This Court Should Remand For Further Consideration Of Respondents' Other Arguments In Support Of Summary Judgment

The error in the lower courts' conclusion about petitioner's seizure does not necessarily mean that summary judgment was unwarranted, let alone that respondents would ultimately be liable for damages. Indeed, a lower court may well determine after further review that respondents' actions were lawful or, at least, did not violate clearly established law.

1. The Fourth Amendment does not prohibit all "seizures," only "unreasonable" ones. U.S. Const. Amend. IV; see, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). Accordingly, a "'[s]eizure' alone is not enough for § 1983 liability." *Brower*, 489 U.S. at 599. Instead, a "claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth

Amendment's 'reasonableness' standard." *Plumhoff* v. *Rickard*, 572 U.S. 765, 774 (2014).

The Fourth Amendment's reasonableness standard balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (citation and internal quotation marks omitted). Thus, while *Hodari D.* suggests that a modest use of force may amount to a seizure in some circumstances, such a seizure is unlikely to significantly intrude on the subject's Fourth Amendment interests and will often be reasonable. And this Court has recognized that not all seizures—even those that would have been "arrests" at common law—require probable cause in order to be reasonable under the Fourth Amendment. See *Terry*, 392 U.S. at 7, 27 (holding that a brief protective physical seizure in which officer grabbed and spun suspect was constitutional if supported by reasonable suspicion).

In this case, respondents have maintained that their use of force, although undisputedly substantial, was nonetheless reasonable because petitioner was driving the SUV in a manner that threatened their lives at the time they fired. See, *e.g.*, Br. in Opp. 2. If that is determined to be correct, either on the current record or in light of any further factual development, then respondents would not have violated the Fourth Amendment at all.

2. In addition, respondents are entitled to qualified immunity unless it was "clearly established at the time of the challenged conduct" that they were violating petitioner's Fourth Amendment rights. *Plumhoff*, 572 U.S. at 778 (citation and internal quotation marks omitted). That qualified-immunity issue may be addressed at any

stage of the case, should be resolved at the earliest possible opportunity, and may obviate any need to examine whether a constitutional violation actually occurred. See *Pearson* v. *Callahan*, 555 U.S. 223, 227 (2009); *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

Particularly in light of this Court's decisions rejecting excessive-force claims in potentially similar contexts, respondents may ultimately be entitled to judgment on qualified-immunity grounds. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 200 (2004) (per curiam) (finding officer entitled to qualified immunity from suit for having "sho[]t a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area [were] at risk from that flight"); see also *Plumhoff*, 572 U.S. at 775-778 (similar); cf. *Mullenix* v. *Luna*, 136 S. Ct. 305, 310 (2015) (per curiam) ("The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity.").

3. The court of appeals affirmed the district court's judgment based solely on its view that no "seizure" occurred here, and it therefore did not have the opportunity to address the officers' alternative grounds for affirmance. See Pet. App. 6a-9a. Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the appropriate course is to vacate the decision below and remand to allow the lower courts to consider those issues in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
ERIC S. DREIBAND
Assistant Attorneys General
ERIC J. FEIGIN
Deputy Solicitor General
ALEXANDER V. MAUGERI
Deputy Assistant Attorney General
REBECCA TAIBLESON
Assistant to the Solicitor General
TOVAH R. CALDERON
JENNY C. ELLICKSON
BRANT S. LEVINE
Attorneys

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